STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

KEITH BRONNER,

Plaintiff,

MSC Docket No. 160242
Court of Appeals Docket 340930

and

ANGELS WITH WINGS TRANSPORT, LLC,

Intervening-Plaintiff,

Lower Court Case No.: 15-013452-NF

- v -

CITY OF DETROIT, a Municipal Corporation,

Defendant,

and

CITY OF DETROIT, a Municipal Corporation,

Third-Party Plaintiff/Appellant,

- v -

GFL ENVIRONMENTAL USA INC., F/K/A
RIZZO ENVIRONMENTAL SERVICES INC.,

Third-Party Defendant/Appellee.

_____/

BRIEF IN RESPONSE TO APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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COUNTER-STATEMENT OF JURISDICTION

Defendant does not contest the City of Detroit's statement of jurisdiction. Defendant does, however, respectfully request that this Honorable Court deny the City of Detroit's application for leave to appeal.

COUNTER-STATEMENT OF ORDER APPEALED

The instant matter is a no-fault action for personal protection insurance benefits (i.e. first-party PIP benefits) from an automobile accident where Plaintiff Keith Bronner alleges he sustained accidental injury while a passenger aboard a bus owned and operated by the Defendant City of Detroit ("Detroit" or "the City"), when it was struck by a vehicle operated by GFL Environmental USA Inc., F/K/A Rizzo Environmental Services Inc. ("GFL" or "Defendant"). Because there was a separate, unrelated contractual agreement between the City and GFL regarding various services, the City filed a third-party action seeking to have GFL either stand in the City's stead for no-fault priority purposes or otherwise indemnify the City for PIP benefits already paid.

GFL moved for summary disposition, noting that priority for first-party insurance obligations may not be contractually altered to place another individual or entity as a higher priority. In addition, GFL noted that the City could not—having already decided to act as a self-insurer—pursue reimbursement via contractual indemnification because this was not an authorized, statutory method of recouping first-party benefits paid. The trial court denied GFL's motion for summary disposition and granted the City's cross-motion for summary disposition. Fortunately, the Michigan Court of Appeals unanimously reversed same, agreeing that the City of Detroit could not—while standing in the shoes of an insurer—shift away its statutory obligations by virtue of an unrelated, fortuitous contractual agreement with GFL, a non-insurer. Quite the contrary, the letter and spirit of the No-Fault Act requires insurers to bear the loss, which is an obligation voluntarily incurred by any entity that chooses to be self-insured. The Court of Appeals did not err in so ruling. GFL respectfully requests that this Honorable Court deny the City of Detroit's application for leave to appeal.

STATEMENT OF QUESTIONS PRESENTED

I. DID THE MICHIGAN COURT OF APPEALS PROPERLY RULE THAT THE CITY COULD NOT BE INDEMNIFIED FOR ITS FIRST-PARTY BENEFITS PAID TO THE UNDERLYING PLAINTIFF, WHERE THE CITY OF DETROIT ONLY INCURRED THE LIABILITY FOR PAYING THE FIRST-PARTY BENEFITS BY CHOOSING TO SELF-INSURE UNDER THE NO-FAULT ACT; WHERE SELF-INSURING ENTITIES INCUR THE RIGHTS AND OBLIGATIONS OF AN INSURER, INCLUDING THE PAYMENT OF BENEFITS WITHOUT REGARD TO FAULT; AND WHERE THE NO FAULT ACT ONLY ALLOWS FOR INDEMNIFICATION OR SUBROGATION TO RECOUP FIRST-PARTY BENEFITS IN CERTAIN CIRCUMSTANCES, NONE OF WHICH ARE APPLICABLE IN THE CONTEXT OF AN UNRELATED CONTRACT TO PERFORM SERVICES ENTERED INTO OUTSIDE THE CONTEXT OF THE NO FAULT ACT?

The City/Appellee will answer: No

GFL/Appellant answers: Yes

The trial court would answer: No

The Michigan Court of Appeals answered: Yes

II. SHOULD THIS COURT DENY THE CITY'S APPLICATION FOR LEAVE TO APPEAL?

The City/Appellee will answer: No

GFL/Appellant answers: Yes

The trial court would answer: N/A

The Michigan Court of Appeals answered: N/A

COUNTER-STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Introduction

The instant matter is a no-fault action for personal protection insurance benefits (i.e. first-party PIP benefits) from an automobile accident where Plaintiff Keith Bronner alleges he sustained accidental injury while a passenger aboard a bus owned and operated by the Defendant City of Detroit ("Detroit" or "the City"), when it was struck by a vehicle operated by GFL Environmental USA Inc., F/K/A Rizzo Environmental Services Inc. ("GFL" or "Defendant"). Because there was a separate, unrelated contractual agreement between the City and GFL regarding various services, the City filed a third-party action seeking to have GFL either stand in the City's stead for no-fault priority purposes or otherwise indemnify the City for PIP benefits paid.

GFL moved for summary disposition, noting that priority for first-party insurance obligations may not be contractually altered to place another individual or entity as a higher priority. GFL further noted that the City could not—having already decided to act as a self-insurer—pursue reimbursement outside of the specific statutory means and methods. The trial court denied GFL's motion for summary disposition and granted the City's cross-motion for summary disposition, concluding that the City could obtain indemnification of its first-party benefits paid. The Michigan Court of Appeals unanimously reversed same, agreeing that the City of Detroit could not—while standing in the shoes of an insurer—shift away its statutory obligations by virtue of an unrelated, fortuitous contractual agreement with GFL, a non-insurer. Quite the contrary, the letter and spirit of the No-Fault Act requires insurers to bear the loss, which is an obligation voluntarily incurred by any entity that chooses to be self-insured. GFL respectfully requests that this Honorable Court deny the City of Detroit's application for leave to appeal.

Statement of Facts

The instant matter is not particularly fact-intensive. The dispute arises out of a no-fault action for personal protection insurance benefits (i.e. first-party PIP benefits) from an automobile accident where Plaintiff Keith Bronner alleged that he sustained accidental injury while a passenger aboard a bus owned and operated by the City, when it was allegedly impacted by a vehicle operated by GFL (Amended Third-Party Complaint, Appendix C[1], ¶ 7). The Amended Third-Party Complaint further confirms that Plaintiff was seeking first-party benefits from the City, inasmuch as it pleads as follows regarding Plaintiff's claims against the City: "As a result of the aforementioned accident, Plaintiff incurred reasonable and necessary expenses as provided for in the Michigan No-Fault Act, MCL §500.3101 *et seq*" (*Id*. at ¶ 7).

Before proceeding further, it is important to consider the distinction between first-party and third-party benefits:

> [W]e recognize that claims for first-party no-fault benefits and third-party tort benefits are qualitatively distinct in nature, such that notice of one does not serve as notice of the other. Most notably, an application for first-party insurance benefits recoverable without regard to fault cannot be equated with a claim for at-fault tort liability. First-party benefits under the no-fault act are creations of, and thus only available pursuant to, statutory law. And SMART's insurer is required to pay no-fault personal protection insurance benefits to individuals injured in accidents involving their buses. A person who proves his entitlement to first-party benefits has proved none of the elements that would entitle him to tort damages. A third-party tort claim is distinct from a claim for first-party benefits because a third-party tort claim involves an adversarial process in which the plaintiff must prove fault in order to recover. [*Atkins v Suburban Mobility Auth for Reg'l Transp*, 492 Mich 707, 718; 822 NW2d 522 (2012)]

[1] Several years ago, the undersigned was advised by the Supreme Court clerk not to attach voluminous exhibits and appendices to briefs filed in this Court, as these are already in the court record. Any document referenced to as an "Appendix" will refer to the appendices attached to GFL's brief on appeal in the Court of Appeals. Any material document appended to this brief will be designated as an Attachment.

In the ordinary circumstance, a party looks to his or her own insurer for reasonable and necessary expenses incurred as a result of an automobile accident. The insurer does not defend against this claim for reasonable and necessary expenses incurred by suggesting an absence of fault. Rather, if the reasonable and necessary expenses were incurred by the insured incident, the payment is made. In contrast, a third-party action involves the recovery of damages based on the fault of the potential defendant.

Here, Plaintiff's claims against the City ("the underlying matter") were based on his allegation that he incurred "reasonable and necessary expenses" because of an automobile accident—a rather plain pursuit of first-party benefits from the City. See Amended Third-Party Complaint, ¶ 7. Plaintiff was not seeking third-party damages from the City. The City's fault, or lack thereof, was irrelevant. The fault of others, including Plaintiff and GFL, was also not relevant.

Indeed, in pursuing claims against GFL, the City specifically alleged that the City's "liability, if any, would be that of an insurer of a motor vehicle pursuant to MCL 500.3114(2)(b-d) . . . " (*Id*. at ¶ 16). MCL 500.3114(2) provides as follows:

> (2) A person suffering accidental bodily injury while an operator or a passenger of a motor vehicle operated in the business of transporting passengers shall receive the personal protection insurance benefits to which the person is entitled from the insurer of the motor vehicle. This subsection does not apply to a passenger in the following, unless that passenger is not entitled to personal protection insurance benefits under any other policy:
>
> > (b) A bus operated by a common carrier of passengers certified by the department of transportation.
> >
> > (c) A bus operating under a government sponsored transportation program.
> >
> > (d) A bus operated by or providing service to a nonprofit organization.

In other words, because Plaintiff did not have his own policy providing personal protection insurance benefits, the No-Fault Act required the parties to look to the insurer of the bus—in this case, the insurer of the bus operated by the City—to provide first-party benefits as a matter of law.

What is also beyond dispute is that the City was the named party in Plaintiff's lawsuit, rather than an insurance company, because the City did not have an insurer. Instead, the City chose to be self-insured. Thus, the only reason that Plaintiff was able to sue the City directly, rather than pursue a claim against an insurance company, was because the City did not obtain insurance to cover such losses. Had the City done so, it would not have been sued by Plaintiff. This meant that Plaintiff's claim against the City was one for first-party benefits against the City as an insurer. See Amended Third-Party Complaint, ¶ 16. Plaintiff's Complaint against the City confirmed same. Plaintiff's Complaint, attached as Appendix D, ¶ 6.[2]

Consistent with this Court's analysis in *Atkins*, Plaintiff's claim against the City was a statutorily-created, first-party claim against the City as an insurer, rather than a third-party claim against the City based on the City's fault. Although the City's liability, if any, to Plaintiff was as an insurer, the City conflated the concepts of first-party and third-party benefits below by suggesting that "liability" and "fault" are somehow pertinent. For example, in paragraph 16 of the Amended Third-Party Complaint, the City alleged, inaccurately, that its liability as an insurer was because of the purportedly negligent actions of GFL. *Id.* The Amended Third-Party Complaint also pleaded claims for contribution and breach of contract based on GFL not agreeing to assume priority or indemnify the City. See generally Amended Third-Party Complaint.

[2] This document is part of the trial court record and was attached to GFL's motion for summary disposition as an exhibit.

GFL promptly moved for summary disposition on the Amended Third-Party Complaint (GFL Motion for Summary Disposition and Support Brief, Appendix E[3]). GFL specifically argued that the No-Fault statutory scheme expressly delineates the priority of insurers, and that insurers were prohibited from changing the order of priority, shifting the order of priority, or seeking recoupment of those expenses via other measures not statutorily-authorized (Appendix E).

The City's responsive brief opposed summary disposition and cross-moved for summary disposition (Appendix F[4]). Attached to the City's motion were excerpts from a "Services Contract" between the City and GFL (Appendix G). The City contended that this "Services Contract" obligated GFL to (a) stand in priority ahead of the City; and (b) indemnify the City for any losses that it incurred, including claims against it as a self-insurer for first-party benefits (Appendices F and G). GFL filed a reply brief observing that the City was relying on a non-binding federal case, while Michigan law confirmed that an insurer (including a self-insurer) could not contractually avoid its priority status (Appendix H).

During a hearing on the parties cross-motions, the trial court seemed to believe that it was proper for the City to try to shift its priority status as an insurer (self-insurer) contrary to the No Fault Act, but was not inclined to rule that the City should prevail on that issue (Transcript, Appendix I, 15-16). However, the trial court unequivocally ruled that the City was allowed to be indemnified for any No Fault Act payments it made (Appendix I, 16). Thus, the trial court was prepared to grant the City's motion for partial summary disposition, while denying GFL's motion for summary disposition (*Id.*). Ultimately, the trial court merely denied GFL's motion, allowing

[3] This brief is attached without the exhibits, all of which are appended separately.
[4] This brief is attached without any of the exhibits, with pertinent exhibits being attached elsewhere.

additional briefing before granting this City's motion for partial summary disposition (Transcript, 17-18; Appendix B).

The City then filed a motion for partial summary disposition, providing proper notice this time (Appendix J, attached without exhibits). The City largely adhered to its prior arguments. GFL filed a motion for reconsideration (Appendix K, attached without exhibits) observing that allowing the City to avoid its No Fault Act obligation was contrary to public policy. GFL also opposed the City's motion for partial summary disposition, further noting that it is contrary to public policy for an insurer to seek reimbursement from a non-insurer (Appendix L). The trial court held another hearing on these motions (Appendix M). The end result was that the Court adhered to its prior conclusion that the City was entitled to partial summary disposition, ordering that an evidentiary hearing be scheduled to determine the City's damages after Plaintiff's claims against the City were resolved (Appendix B).[5]

In the meantime, the City resolved the pending first-party action filed by Plaintiff for approximately $50,000.00. Although not pertinent to this appeal, the City made multiple failed attempts to convert this settlement amount into a judgment, before finally following the trial court's express directive to schedule a post-settlement evidentiary hearing on the issue of damages (City's Motion for Judgment, Appendix N). After lengthy proceedings to resolve the judgment amount, and more particularly the attorney fees the City was entitled to, a judgment for the City against GFL was entered on October 13, 2017 (Appendix A). GFL filed a timely claim of appeal.

After briefing and oral argument, the Michigan Court of Appeals ruled that the trial court erred in allowing the City to enforce an indemnification provision with respect to this first-party

[5] GFL filed an application for leave to appeal from these trial court rulings. The Michigan Court of Appeals denied the application for leave to appeal, not persuaded that it needed to grant interlocutory review.

benefit obligation incurred by virtue of the City's status as self-insurer (Court of Appeals decision, Attachment 1). The Court specifically recognized that the City became a *de facto* insurer upon self-insuring (*Id*. at 5-6).

The Court also observed that this Court had previously ruled that, "[u]nlike mandatory PIP coverages, parties to a contract are free to shift the costs associated with optional no-fault coverages" (*id*. at 5, citing *Universal Underwriters Ins Co v Kneeland*, 464 Mich 491; 628 NW2d 491 (2001)). The Court of Appeals further opined as follows regarding this Court's *Universal Underwriters* decision:

> Presuming that the parties intended to enter into a valid and enforceable agreement, the Court concluded that the parties only intended to shift liability for collision damages, an optional form of coverage under the no-fault act. *Id*. at 496-499. Emphasizing that collision coverage was an optional form of coverage, the Court concluded that allocating responsibility for collision coverage was purely a matter of contract that did not violate the no-fault act. *Id*. 500. Indeed, the holding in *Universal Underwriters* specifically recognized that a contractual allocation of responsibility for collision damages is not void under the no-fault act because "[t]he statutory language does not reflect an intent to abolish contractual liability for collision damages, an optional form of insurance not required by the no-fault act." *Id*.
>
> The Court acknowledged the limitations of its holding in a footnote, emphasizing that its holding was "limited to contract claims for collision damages" and offering "no view regarding the legality of a contract purporting to shift liability for other categories of damages." *Id*. Elsewhere, citing *State Farm Mut Auto Ins Co*, 452 Mich at 36, the *Universal Underwriters* Court suggested that a "shift of liability" that "could reach damages for which no-fault insurance coverage is mandatory . . . might contravene the no-fault act." *Universal Underwriters Ins Co*, 464 Mich at 496-497. But, the Court did not decide whether a contractual shift reaching beyond optional collision coverage was illegal; instead, the Court simply noted that the "argument is available" for future cases. *Id*. at 496 n 3.
>
> As noted, left unanswered by the *Universal Underwriters* decision is whether parties may contractually seek reimbursement for damages subject to mandatory coverage under the no-fault act. See *id*. We conclude that the text of the no-fault statute provides the only way for shifting the costs of mandatory PIP coverage after payment is made, and because the private indemnification agreement used in this case is not anticipated by the act, it is unenforceable. [Attachment 1, *supra* at 6.]

Against that backdrop, the Court of Appeals observed that the No Fault Act statutory scheme was comprehensive by design. *Id*. at 6-7. Where the No Fault Act provides specific remedies for an insurer to obtain recoupment, these statutory remedies "represent the only way permitted by the no-fault act for shifting costs after PIP benefits have been paid to the injured party." *Id*. at 7. Applying the "whole text" statutory construction canon, the Court of Appeals opined as follows: "If the legislature had desired other cost-shifting procedures, or wants to in the future, it is the legislature's province to create the appropriate statutory mechanism to do so." *Id.* at 7-8.[6]

In sum, the Court of Appeals ruled that the trial court erred in denying GFL's motion for summary disposition and allowing the City to recover a judgment to recoup its first-party benefits paid, as a self-insurer, to Plaintiff. The City filed a motion for reconsideration, which was denied by the Michigan Court of Appeals denied the City's motion for reconsideration (Attachment 2). The Michigan Court of Appeals also denied GFL's request to publish the opinion, leaving the decision without status as binding authority.

This application for leave to appeal follows. GFL respectfully requests that this Honorable Court deny the City's application for leave to appeal. Additional facts may be set forth below where pertinent to the individual issues raised on appeal.

[6] The Court also ruled that the trial court erred in awarding certain attorney fees to the City—an issue that is not part of the instant application for leave to appeal.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY RULED THAT GFL WAS ENTITLED TO SUMMARY DISPOSITION BECAUSE THE CITY OF DETROIT, AS A SELF-INSURER UNDER THE NO-FAULT ACT, IS PROHIBITED FROM TRANSFERRING ITS FIRST-PARTY BENEFIT LIABILITY ABSENT STATUTORY AUTHORIZATION AND MAY NOT DO SO VIA AN UNRELATED, FORTUITOUS CONTRACT WITH A NON-INSURER.

a. Standard of Review

The issues in this matter have been resolved by a combination of rulings that (a) granted the City's motion for partial summary disposition; and (b) denied GFL's motion for summary disposition. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Braverman v Granger*, 303 Mich App 587, 595; 844 NW2d 485 (2014). MCR 2.116(C)(8) permits summary disposition when a plaintiff's complaint fails "to state a claim on which relief can be granted." The rule therefore "tests the legal sufficiency of the complaint on the basis of the pleadings alone." *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). A motion under MCR 2.116(C)(8) should be granted if "the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim. *Allstate Ins Co v State of Michigan, Dep't of Management and Budget*, 259 Mich App 705, 709-710; 675 NW2d 857 (2003). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v General Motors*, 469 Mich 177, 182; 665 NW2d 468 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might

differ." *Id*. Ordinarily, the party moving for summary disposition pursuant to MCR 2.116(C)(10) bears the initial burden of supporting its position with affidavits, depositions, and other evidence. *Auto Club Ins Ass'n v State Automobile Mutual Ins Co*, 258 Mich App 328, 332-333; 671 NW2d 132 (2003). The burden then shifts to the party opposing the motion to demonstrate, through admissible evidentiary materials, that a material question of fact exists. *Id*. When Plaintiff fails to raise material factual disputes and the undisputed evidence demonstrates that Plaintiff's claim fails, a trial court properly grants a Defendant's motion for summary disposition. *See West, supra*.

b. Overview of the No-Fault Act

Under Michigan law, liability arising from the ownership, maintenance, or use of a motor vehicle was abolished by operation of the Michigan No-Fault Act. MCL § 500.3135(3). Where there remains any liability, it is only because the Legislature expressly provided for same.

The No Fault Act first distinguishes between a first-party PIP benefits claim against an insurer and a third-party action for damages against a potentially at-fault party. The Michigan Supreme Court has recognized the distinction between first-party and third-party claims under the No Fault Act:

> [W]e recognize that claims for first-party no-fault benefits and third-party tort benefits are qualitatively distinct in nature, such that notice of one does not serve as notice of the other. Most notably, an application for first-party insurance benefits recoverable without regard to fault cannot be equated with a claim for at-fault tort liability. First-party benefits under the no-fault act are creations of, and thus only available pursuant to, statutory law. And SMART's insurer is required to pay no-fault personal protection insurance benefits to individuals injured in accidents involving their buses. A person who proves his entitlement to first-party benefits has proved none of the elements that would entitle him to tort damages. A third-party tort claim is distinct from a claim for first-party benefits because a third-party tort claim involves an adversarial process in which the plaintiff must prove fault in order to recover. [*Atkins, supra* at 718.]

Indeed, first-party benefits are due and owed by an insurer without regard to fault. MCL 500.3105(2)("Personal protection insurance benefits are due under this chapter without regard to fault."). In contrast, claims for damages in a third-party context require proof of fault; however, with a third-party action for damages, recovery is allowed only for death, permanent disfigurement, and "serious impairment of a body function" as defined by the No-Fault Act. MCL §500.3135(1).

In light of the above, it is plainly apparent that the Legislature was accomplishing multiple goals. With respect to first-party benefits, the Legislature was ensuring prompt and automatic recovery of *economic* losses without regard to fault. However, rather than wholly precluding an accident victim from recovering non-economic damages, the Legislature required proof of fault, as well as proof of a "threshold injury." MCL 500.3135(1).

The Legislature endeavored to make the No Fault Act comprehensive enough to cover likely scenarios. For example, in the context of a bus incident, the Legislature provided that the insurer of the bus pays first-party benefits—i.e. reasonable and necessary expenses without regard to fault. MCL 500.3114(2)(b-d). Thus, where a claim for first-party benefits is made with respect to a bus incident, it is made against the insurer of the bus.

Inasmuch as the entire purpose of the No Fault Act was to ensure prompt payment of claims, the statutory scheme contains a number of provisions and trade-offs. Again, as noted above, the abolition of tort liability was replaced with (a) first party benefits without a showing of fault; and (b) third-party damages available only in limited circumstances. In further exchange for an insurer facing responsibility for a substantial first-party benefits claim, the Legislature created one source of indemnification—the Michigan Catastrophic Claims Association ("MCCA"). MCL 500.3114. Where first-party benefits will exceed a certain statutory amount, the MCCA will

indemnify the insurer out of a pool created by various insurer participants. MCL 500.3114(2). MCL 500.3114 does not authorize an insurer to obtain indemnification from any other source. **Importantly, the Legislature did not provide any other method by which an insurer could be indemnified for paying first-party benefits**.

MCL 500.3116 does allow an insurer paying first-party benefits to pursue *subrogation* from a tortfeasor in certain instances. Specifically, MCL 500.3116(2) notes that such subrogation can be pursued only in rare circumstances, such as a tort recovery by a plaintiff against an at-fault defendant "from an accident occurring outside this state, a tort claim brought within this state against the owner or operator of a motor vehicle with respect to which the security required by section 3101(3) and (4) was not in effect, or a tort claim brought within this state based on intentionally caused harm to persons or property . . . ." MCL 500.3116 only affords the right of subrogation where an insurer's insured files a tort claim against a third-party tortfeasor, and only then in certain circumstances. MCL 500.3116 does not provide for, or even contemplate, an indemnification action. Again, the only source of indemnification for an insurer under the No Fault Act is MCL 500.3114.

c. The City is Not Entitled to Contract Away its Obligation to Pay Mandatory, First-Party Benefits

As noted above, the instant matter is a no-fault action for first-party PIP benefits by Plaintiff Keith Bronner against the City. Importantly, the City was not sued for and did not incur any liability to pay third-party damages. Instead, the City, standing in the shoes of an insurer for purposes of the No Fault Act, paid first-party damages. As a self-insurer, the City was not allowed to contract away its responsibilities under the No Fault Act. The trial court erroneously ruled that the City could do so, and the Michigan Court of Appeals properly recognized that this was an error requiring reversal.

Overview. As an initial matter, it must be reiterated that the City is a defendant in Plaintiff's lawsuit only because it was self-insured. The Underlying Plaintiff sued for first-party benefits. If the City had obtained pertinent insurance to cover Plaintiff's loss, the City would not have been sued directly. If so, the City would not have incurred any loss. In addition, the City has not been sued under any theory that would require a finding of fault as to the City (or anyone else, for that matter). At the risk of being repetitive, the only reason, therefore, that the City has been sued is because it voluntarily chose to act as an insurer by self-insuring.

It is certainly permissible for the City to act as a self-insured. The No Fault Act statutory scheme does include a provision allowing for entities to serve as their own insurer:

> (4) Security required by subsection (1) may be provided by any other method approved by the secretary of state as affording security equivalent to that afforded by a policy of insurance, if proof of the security is filed and continuously maintained with the secretary of state throughout the period the motor vehicle is driven or moved on a highway. **The person filing the security has all the obligations and rights of an insurer under this chapter.** When the context permits, "insurer" as used in this chapter, includes a person that files the security as provided in this section. [MCL 500.3101(4); emphasis added.]

The City, by having filed the security under MCL 500.3101(4), was allowed to self-insure. However, by doing so, the City incurred all the rights of an insurer, but it also incurred all of the obligations of an insurer. *Id.*

Stated otherwise, the City cannot have it both ways. It cannot eschew the obligation to obtain insurance by acting as an insurer for some No Fault Act purposes, but then also attempt to avoid its status as an insurer (i.e. self-insurer) for other No Fault Act purposes. Instead, by choosing to self-insure and step into the role of an insurer for purposes of first party benefits, the City is obligated to follow the same rules and limitations that insurers must follow. MCL 500.3101(4). Therefore, for purposes of this litigation, the City essentially was and is an insurance company.

The City's Abandoned Attempt to Directly Shift Priority Status. In opposing GFL's motion for summary disposition, the City advanced two arguments. These arguments were later re-raised in the City's own motion for partial summary disposition. The City's first basis for relief in its favor was an argument that the City was able to contractually shift priority for first party benefits from itself onto GFL based on a Services Contract between the City and GFL (Appendix F, 9-10). Fortunately, the City has abandoned this theory of recovery.

However, it is important to briefly analyze that there are very good reasons as to why an insurer (including a self-insurer) cannot shift the priority status. Here, of course, the City's argument should have failed simply on a fact basis. The City only attached a portion of the Services Contract at issue (Appendix G), limiting itself to just to the few pages containing an indemnification provision. Nowhere does it identify an obligation for GFL to expressly assume a priority status for purposes of the No Fault Act. There is simply no basis in the Services Contract to conclude that GFL agreed to be the priority insurer under the No Fault Act.

From a more legal perspective, the City contended that insurers are allowed to contract between each other for differing priority, citing *Doss v Citizens Ins Co*, 146 Mich App 510; 381 NW2d 409 (1985)(Appendix F, 9). The *Doss* matter was issued by the Court of Appeals before 1990 and was, of course, not binding law. MCR 7.215(J)(1). In addition, in *Mich Millers Mut Ins Co v Lancer Ins Co*, 23 F Supp 3d 850, 859-860 (ED Mich, 2014), the court distinguished *Doss* on the basis that it was between two insurers, rather than between an insurer and a non-insurer. In addition, the court recognized that, unlike *Doss*, it was not presented with a contract with a specific provision regarding No Fault coverage. *Id.* In other words, the court rejected the idea that a non-insurer could implicitly assume a priority status in a contract without a direct reference to same. *Id.* Instead, the court concluded that the provisions of the No Fault Act were mandatory regarding

the "order of priority for persons seeking to recover funds for property damage caused by a motor vehicle." *Id.*

GFL respectfully contends that, between the two non-binding decisions, *Michigan Millers* more correctly states the law of Michigan. Here, as in *Michigan Millers*, there is no provision regarding the No Fault Act in the Services Contract (see excerpt made part of the record by the City, Appendix G). There is certainly no express assumption of priority status by GFL. In fact, given that the Services Contract mentions GFL obtaining automobile insurance, but is silent regarding a shift in priority under the No Fault Act, this should be a rather plain confirmation that the Services Contract did not intend to shift priority under the No Fault Act.

In addition, although the Services Contract required that the City be named as an additional insured under the Commercial General Liability policy (Services Contract, ¶ 10.2), no such provision was included for the Automobile Liability Insurance policy (see Services Contract). The Services Contract certainly did not require GFL to list the City's buses as vehicles for which it would provide first-party benefits (see Services Contract). Instead, the Automobile Liability Insurance provisions of the Services Contract were rather plainly limited to GFL's vehicles—which makes complete sense under the No Fault Act. The Services Contract certainly failed to effectuate a transfer of priority by its own terms.

Moreover, the instant matter is plainly unlike *Doss*, which involved the dealings between insurers. GFL is not an insurer. Although the City is not an insurer, for purpose of this litigation, it is to be treated as an insurer. MCL 500.3101(4). To the extent that the trial court followed *Doss*, rather than *Michigan Millers*, this was legal error.

Perhaps more importantly, any attempt to transfer priority away from the priority determinations provided by statute is contrary to the public policy of Michigan. This has been

clearly stated in several cases, such as *Corwin v DaimlerChrysler Ins Co*, 296 Mich App 242, 247; 819 NW2d 68 (2012) and *State Farm Mut Auto Ins Co v Enterprise Leasing Co*, 452 Mich 25, 40-41; 549 NW2d 345 (1996).

In *Corwin*, the plaintiffs suffered severe injuries in an auto accident while driving a vehicle leased from defendant Chrysler and self-insured through DaimlerChrysler Insurance Company ("Chrysler Insurance"). *Corwin, supra* at 242. The plaintiffs were not "named insureds" on the Chrysler Insurance policy, but did own two other motor vehicles which were insured by Auto Club Insurance Association ("Auto Club") and Foremost Insurance Company ("Foremost"), respectively, and were "named insureds" under those policies. *Id*. Chrysler attempted to circumvent its priority as a first-party insurer based on the fact that the plaintiffs were not "named insureds" on the Chrysler Insurance policy and based on the Chrysler Insurance policy language that expressly excluded coverage of drivers who were "named insureds" under another policy. *Id*. This Court held that the Chrysler Insurance policy was invalid under the No Fault Act and required reformation because, in pertinent part, the policy contravened public policy because the Chrysler Insurance policy "enable[d] Chrysler Insurance to avoid primary liability for PIP benefits that are payable to injured people that Chrysler Insurance personally insures, i.e., the [plaintiffs]." *Id*. at 262. The *Corwin* panel relied in part on the reasoning in *Enterprise Leasing*, where the Michigan Supreme Court ruled that the No Fault Act was violated by car rental agreements that shifted the responsibility for providing primary residual liability coverage from the vehicle owner to the driver and the driver's insurer. *Corwin, supra* at 262-263, citing and quoting *Enterprise Leasing, supra*.

Here, as in *Corwin* and *Enterprise Leasing*, as well as *Fuller v GEICO Indem Co*, 309 Mich App 495; 872 N2d 504 (2015), the trial court should have recognized that the Legislature has specifically delineated (in MCL 500.3114(2)) that the City's insurer be first in priority for

providing first party benefits to Plaintiff. Because the City was self-insured, there was no "City's insurer." But, much like the hypothetical "City's insurer" would not be able to contract away its priority status, the City as a self-insured was not allowed to contract away its priority status as a matter of law.

The Court of Appeals Properly Ruled That Indemnification Was Improper. The second basis asserted by the City was an argument that the City was able to obtain indemnification from GFL for first party benefits that it paid based on the Services Contract (Appendix G, 10-14). The trial court accepted this argument, but the Michigan Court of Appeals properly reversed same.

In *Corwin*, this Court recognized that "'An insurer who elects to provide automobile insurance is liable to pay no-fault benefits subject to the provisions of the [no-fault] act.'" *Corwin, supra* at 254, quoting *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 530; 740 NW2d 503 (2007). In addition, although the City was statutorily allowed to self-insure, by self-insuring, the City incurred "all the obligations and rights of an insurer under this chapter." MCL 500.3101(4). Thus, the City was statutorily obligated to pay no-fault (i.e. first-party) benefits to Plaintiff subject to the provisions of the No Fault Act.

The question then turns to whether the City, as a self-insurer with the rights and *obligations* of an insurer, MCL 500.3101(4), is allowed to be indemnified for its payment of first-party benefits. GFL respectfully contends that no insurer, including a self-insurer, can recoup its first-party benefits paid absent statutory authority for same. This is reflected by the enactment of specific statutory provisions regarding indemnification and subrogation in MCL 500.3114 and MCL 500.3116. The problem for the City is that its pursuit of indemnification was not authorized by either MCL 500.3114 or MCL 500.3116.

Although the Legislature could have been silent on the issue of when an insurer or self-insurer could recoup its first-party benefits paid, the Legislature was not silent. Instead, the Legislature provided certain specific circumstances where first-party benefits paid could be recouped. The doctrine of *expressio unius est exclusio alterius* confirms that the Legislature's specific enumeration of methods of recoupment rules out all other methods:

> Their enumeration eliminates the possibility of their being other exceptions under the legal maxim expressio unius est exclusio alterius. The maxim is a rule of construction that is a product of logic and common sense. *Feld v Robert & Charles Beauty Salon*, 435 Mich. 352, 362; 459 N.W.2d 279 (1990), quoting 2A Sands, Sutherland Statutory Construction (4th ed), § 47.24, p 203. This Court long ago stated that no maxim is more uniformly used to properly construe statutes. *Taylor v Michigan Public Utilities Comm*, 217 Mich. 400, 403; 186 NW 485 (1922). [*Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74-75; 711 NW2d 340 (2006).]

Thus, for nearly 100 years, Michigan law has recognized that *expressio unius est exclusio alterius* is a maxim that is properly applied to statutory construction. A faithful application of that maxim to the No Fault Act leads to but one conclusion—that unless the City can recoup its first-party benefits paid under a statutorily-enumerated method, it may not do so at all.

The first statutory provision allowing for recoupment of first-party benefits is MCL 500.3114(2), which allows for statutory indemnification by one method. The Legislature created one source of indemnification—the MCCA. MCL 500.3114. Where first-party benefits will exceed a certain statutory amount, the MCCA will indemnify the insurer out of a pool created by various insurer participants. MCL 500.3114(2). MCL 500.3114 does not authorize an insurer to obtain indemnification from any other source. Importantly, the Legislature did not provide any other method by which an insurer could be indemnified for paying first-party benefits. Quite obviously, MCL 500.3114 does not support allowing an insurer to be indemnified by any entity other than the MCCA.

There is no provision allowing an insurer to pursue contractual indemnification for first-party benefits. There is no provision allowing an entity that self-insurers to pursue contractual indemnification for first-party benefits. Instead, the only indemnification for first-party benefits is, where even applicable, via the MCCA. MCL 500.3114 certainly does not support the trial court's ruling that the City could be indemnified by any other entity with respect to recouping the first-party benefits it paid. The Court of Appeals properly recognized same.

Next, MCL 500.3116 allows an insurer paying first-party benefits to pursue recoupment from at fault parties in certain instances. Specifically, MCL 500.3116(2) states in pertinent part as follows:

> A subtraction from or reimbursement for personal protection insurance benefits paid or payable under this chapter shall be made only if recovery is realized upon a tort claim arising from an accident occurring outside this state, a tort claim brought within this state against the owner or operator of a motor vehicle with respect to which the security required by section 3101(3) and (4) was not in effect, or a tort claim brought within this state based on intentionally caused harm to persons or property, and shall be made only to the extent that the recovery realized by the claimant is for damages for which the claimant has received or would otherwise be entitled to receive personal protection insurance benefits.

This statutory provision allows an insurer that paid or may pay first party benefits to reduce or recoup its obligation with respect to a "recovery on a tort claim" against a tortfeasor.

Here, however, Plaintiff did not sue GFL in tort. If Plaintiff had sued GFL, Plaintiff could only have "recovered" by establishing a threshold injury, as set forth in MCL 500.3135(1). In the absence of Plaintiff proving same, GFL could not be obligated to pay <u>any</u> damages whatsoever. Moreover, inasmuch as Plaintiff did not sue GFL in tort, Plaintiff certainly did not have any recovery from GFL in tort. In the absence of a recovery by the Plaintiff, there is no amount to credit to the City or otherwise allow reimbursement. In the absence of a suit and recovery by Plaintiff against GFL, MCL 500.3116 is plainly applicable to the instant matter.

If that were not enough, even the right to recoupment in MCL 500.3116 is limited to out-of-state accidents, in-state accidents against uninsured vehicle owners, and intentional torts. These additional obstacles in MCL 500.3116 are not satisfied in the instant matter. Quite the contrary, the instant matter is plainly an in-state matter involving an insured vehicle, without any allegation of intentional harm. The City could not recover from GFL under MCL 500.3116 for many reasons.

The Court of Appeals also observed that there is a material distinction between mandatory PIP benefits and optional coverages. The Court of Appeals specifically opined as follows regarding this Court's *Universal Underwriters* decision:

> Presuming that the parties intended to enter into a valid and enforceable agreement, the Court concluded that the parties only intended to shift liability for collision damages, an optional form of coverage under the no-fault act. *Id*. at 496-499. Emphasizing that collision coverage was an optional form of coverage, the Court concluded that allocating responsibility for collision coverage was purely a matter of contract that did not violate the no-fault act. *Id*. 500. Indeed, the holding in *Universal Underwriters* specifically recognized that a contractual allocation of responsibility for collision damages is not void under the no-fault act because "[t]he statutory language does not reflect an intent to abolish contractual liability for collision damages, an optional form of insurance not required by the no-fault act." *Id*.
>
> The Court acknowledged the limitations of its holding in a footnote, emphasizing that its holding was "limited to contract claims for collision damages" and offering "no view regarding the legality of a contract purporting to shift liability for other categories of damages." *Id*. Elsewhere, citing *State Farm Mut Auto Ins Co*, 452 Mich at 36, the *Universal Underwriters* Court suggested that a "shift of liability" that "could reach damages for which no-fault insurance coverage is mandatory . . . might contravene the no-fault act." *Universal Underwriters Ins Co*, 464 Mich at 496-497. But, the Court did not decide whether a contractual shift reaching beyond optional collision coverage was illegal; instead, the Court simply noted that the "argument is available" for future cases. *Id*. at 496 n 3.
>
> As noted, left unanswered by the *Universal Underwriters* decision is whether parties may contractually seek reimbursement for damages subject to mandatory coverage under the no-fault act. See *id*. We conclude that the text of the no-fault statute provides the only way for shifting the costs of mandatory PIP coverage after payment is made, and because the private indemnification agreement used in this case is not anticipated by the act, it is unenforceable. [Attachment 1, *supra* at 6.]

The Court of Appeals reasonably and correctly observed that the No Fault Act statutory scheme was comprehensive by design. *Id*. at 6-7. Where, as here, the No Fault Act provides specific remedies for an insurer to obtain recoupment, these statutory remedies "represent the only way permitted by the no-fault act for shifting costs after PIP benefits have been paid to the injured party." *Id*. at 7. Applying the "whole text" statutory construction canon, the Court of Appeals opined as follows: "If the legislature had desired other cost-shifting procedures, or wants to in the future, it is the legislature's province to create the appropriate statutory mechanism to do so." *Id.* at 7-8.

The Court of Appeals' ruling was entirely correct. The Legislature set out to enact a comprehensive statutory scheme to cover the rights and obligations of numerous participants in the No Fault Act system. The Legislature crafted a statutory scheme where insurers and self-insurers of vehicles incurred liability for certain types of damages falling into the category of first-party benefits. The Legislature included certain, specific methods for such an insurer or self-insurer to obtain reimbursement for the payment of first-party benefits. See e,g, MCL 500.3114, MCL 500.3116. The City's paid mandatory first-party benefits, but cannot satisfy any of the statutory subsections applicable to being reimbursed for or recouping those benefits. Although the Legislature could have provided for contractual indemnification as one of those methods, it did not do so. If the Legislature chooses to do so in light of this case, then it is certainly free to do so. But it is plainly apparent that the Legislature did not see fit to include contractual indemnification, especially from an at-fault party, as a method of recoupment or reimbursement. Thus, the Court of Appeals correctly construed the No Fault Act as a whole to preclude the City's pursuit of indemnification in this matter.

Moreover, when an insurer charges a premium, it does so with express knowledge that it will incur certain liabilities and have very limited rights to indemnification, subrogation, and recoupment. The insurer must craft its premiums with full knowledge that first-party benefits will only rarely be recouped. If an insurer could potentially recoup first-party benefits, this could lead to a windfall. It would also lead to more lawsuits, as more insurers would seek reimbursement from at-fault third-parties. Among the purposes of the No Fault Act was to decrease litigation and stabilize premiums. If insurance premiums were a product of which insurance company was more effective at obtaining reimbursement from at-fault parties and contractual targets, premiums would vary significantly every year. Insurers, who know the No Fault Act rules, are fully aware that they cannot recover their expended first-party benefits.

The only reason why the City sued GFL is because the City is not formally in the insurance business and is presumably not sufficiently familiar with the No Fault Act. However, by self-insuring, the City is an insurer with respect to paying first-party benefits and the ability to recoup same. It would be a perverse result if the City could avoid paying premiums by treating itself as a self-insured, and then obtain an extra benefit compared to ordinary insurers by being allowed to pursue remedies not available to those insurers. Instead, as a self-insurer, the City acquired the obligations of an insurer—including the obligation to pay first-party benefits without any rights to recoupment beyond those statutorily provided.

Of course, the City also failed to show that it could properly obtain indemnification under the Services Contract for liability that it has incurred because of a statutory obligation that is entirely unrelated to the concepts of negligence, liability, and fault. As noted above, first-party benefits are due and owed by an insurer *without regard to fault*. MCL 500.3105(2) is clear in this regard: "Personal protection insurance benefits are due under this chapter without regard to fault."

The City was not sued because it was at fault. If the City had been insured, the City would not have been sued at all because the City's insurer would pay PIP benefits. And whether another entity was negligent, liable, or at fault is entirely would have been entirely irrelevant to that hypothetical insurer's statutory obligations. Thus, to the extent that the City sought indemnification from GFL contending that GFL was at fault for the incident, this was irrelevant to the City's liability (or lack thereof) to pay Plaintiff first-party benefits. Instead, the City is obligated because it operates a bus transportation system that carries passengers—and those passengers lacking insurance will be covered for losses by the City's insurance (self-insurance) by statute. MCL 500.3114(2). Again, fault plays no role, merely bus ownership. And the City voluntarily and exclusively owned the bus in question; this is the true cause of the City's liability. In fact, Plaintiff did not have to allege, much less prove, the fault of anyone in its claim against the City. The Services Contract was not even triggered, further supporting a conclusion that the trial court erred in allowing indemnification.

For all these reasons, GFL respectfully contends that the Court of Appeals correctly reversed the trial court. The trial court erred in allowing the City to pursue and obtain a right of indemnification from GFL for the City's first-party benefits payable under the No Fault Act.

d. The City's Arguments Are Without Merit

After the Court of Appeals decision, the City filed a motion for reconsideration raising a variety of issues, including new issues not previously raised in the Michigan Court of Appeals or the trial court level. This Court should decline to consider any arguments not raised below before issuance of the Court of Appeals' opinion in this matter. Even so, those arguments are without substantive merit. The City's other raised issues do not support this Court's intervention either.

Accordingly, this Court should reject these arguments and deny the City's application for leave to appeal.

The first "issue" raised by the City is really an introductory attempt to impact this Court's analysis based on the City's has a financial need for relief. While "Lady Justice" is normally depicted with a blindfold, the City would have this Court remove the blindfold and improperly factor in the City's dire financial situation. The undersigned does not doubt that the City's financial position presents challenges, however there is absolutely no factual basis in the record to support the statement that the City "has been unable to secure insurance . . . that provides meaningful protection" (Application, 1). The City has not provided any indication that it is precluded from insuring or that there is no insurance pool available for municipalities.

The City also resorts to fear-mongering regarding the impact of a future catastrophic liability. However, this very same issue is one that the Legislature contemplated with respect to impact on insurance companies. The Legislature wisely decided to create a secondary source for such obligations, so that the risk could be spread out among the insurance pool. By self-insuring, the City is (a) removing its premiums from the insurance pool applicable to all statewide accidents; and (b) exposing itself unnecessarily to the risk of a substantial liability. Moreover, even if the City could obtain indemnification via some contracts, the hypothetical catastrophe the City purports to fear could arise in the far more common circumstance where there is no indemnification target whatsoever. Presumably, the City calculated these risks when undertaking a decision to eschew insurance and self-insure. If not, the City is now aware of the risk and can take action before such a situation arises. Even worse, the City never raised its financial issues at the trial court level or in its Court of Appeals briefing. These are new issues, improperly raised for the first time on appeal.

Of course, none of these particulars regarding the City of Detroit are relevant to the simple issue of statutory construction. Statutory schemes are not construed based on the financial impact to the parties. The City suggests that because the No Fault act does not have a specific subsection prohibiting a "contractual indemnification from tortfeasor" option, then this issue becomes a "freedom of contract" issue. However, there is no "common law" entitlement to first party benefits. At common law, a plaintiff would have to sue an at-fault party to recover any damages that would, today, encompass the first-party benefits. The No-Fault statutory scheme changed this, allowing certain economic damages—first-party benefits—to be paid by an insurer as a matter of law without regarding to fault. MCL 500.3105. Because the insurer's obligation arises by statute, "the statute is the 'rule book' for deciding the issues involved in questions regarding awarding those benefits." *Rohlman v Hawkeye-Sec Ins Co*, 442 Mich 520, 524-25; 502 NW2d 310 (1993). Thus, contrary to the City's suggestion, the statutory scheme absolutely determines what is proper or improper with respect to all aspects of first-party benefits.[7] The City's financial situation is simply irrelevant.

Next, the City argued that its freedom to contract should supplant the statutory scheme. The statutory scheme simply does not provide an "indemnification from tortfeasor" option. It does provide (a) the circumstances of when an insurer can obtain indemnification, MCL 500.3104(2); and (b) the circumstances of when an insurer can recover its first-party benefits from a tortfeasor,

[7] To be sure, the enactment of the No Fault Act did not eliminate the pre-existing right of an insurer to defend its liability by arguing that the policy obligating it to pay first-party benefits was procured by fraud. See *Bazzi v Sentinel Ins Co*,__ Mich __; __NW3d__; 2018 Mich. LEXIS 1361 (July 18, 2018). An insurer had a right to defend against the existence of a policy before the No-Fault Act and this defense continues notwithstanding the enactment of same. The No Fault Act does not purport to abrogate this common law defense. In contrast, the No Fault Act does speak to the circumstances where an insurer can pursue indemnification (MCL 500.3104(2)) and reimbursement from a tortfeasor (MCL 500.3116). The Legislature has not been silent, but has spoken as to the means and methods by which these may be accomplished.

MCL 500.3116. However, these provisions only apply in certain, limited circumstances not applicable to this matter. The Legislature did not include any provision recognizing recoupment, reimbursement, or indemnification from a tortfeasor based on contractual obligation.

Frankly, the City is already stretching when suggesting that this was an issue even contemplated by the parties. Although the City required GFL to obtain automobile insurance to cover GFL's vehicles, the City did not even require GFL to name the City as an additional insured as to GFL's automobile insurance policy (Contract, ¶¶ 10.01-10.02). This was only required as to the CGL GFL's general liability policy.

Moreover, a valid contract requires a "meeting of the minds" on all the essential terms. *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 548; 487 NW2d 499 (1992). Here, the indemnification clause in the contract did not expressly reference GFL assuming an obligation to indemnify the City for its business decision to self-insure its municipal bus operation. Again, if the City had obtained insurance, GFL could not and would not have been sued. It is only because the City self-insured that Plaintiff's lawsuit against the City was even tenable. Indeed, the City was only sued because Plaintiff was unable to sue the City's non-existent insurer. The City cannot self-insure to obtain the rights of an insurer, but then convert back to non-insurer status to pursue indemnification. And if the City is permitted such a strange ability to change identities back and forth, it should only be in a contractual setting that clearly and expressly sets forth that the other party is incurring indemnification liability for same. The City cannot be permitted to do so on the basis of a general indemnification clause (see Contract, ¶ 9.01). This contract simply cannot justify imposing an indemnification obligation on GFL as a matter of law.

Next, the City suggests that the Court of Appeals erred because of the City is a municipality and entitled to "home rule" city protections. As a preliminary matter, this issue was not briefed at

the trial court level. This issue was not raised in the briefing before the Michigan Court of Appeals issued its opinion. In fact, the first time the issue was raised was in the City's motion for reconsideration filed post-Opinion in the Michigan Court of Appeals. Quite obviously, this issue is not properly preserved for appeal to any appellate court. See *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Moreover, the issue is barely briefed—one paragraph of cursory analysis. Ordinarily, a party waives an issue when it gives the issue cursory treatment on appeal. *Badiee v Brighton Area Sch*, 265 Mich App 343, 359; 695 NW2d 521 (2005). The City offers no explanation for why this Court should disregard traditional appellate rules regarding preservation and presentation with respect to this issue.

Moreover, the City misses the point. The Legislature has spoken on this issue. The Legislature enacted a comprehensive statutory scheme that did not provide for any reimbursement for insurers, except in two limited circumstances, both of which are inapplicable here. MCL 500.3104; MCL 500.3116.

In addition, although the No Fault Act sets forth a priority status scheme that does not expressly prohibit the contracting away of that priority status, Michigan law nevertheless recognizes that any attempt to do so is contrary to public policy. This has been clearly stated in several cases, such as *Corwin* and *State Farm*. In *Corwin*, the Court observed that there is obviously a "freedom of contract," but that this freedom does not extend to violating public policy by supplanting statutory, priority determinations. Instead, the Legislature intended that certain insurers bear liability for first party benefits and they must do so.

Similarly, the Michigan Legislature did not intend for insurers to recoup first-party benefits from tortfeasors, except as provided in MCL 500.3116. The Legislature was not silent, the Legislature spoke as to the issue. The City's attempted method to recover from GFL as a tortfeasor

was not a method authorized by MCL 500.3116. Moreover, as it relates to indemnification, the Legislature provided a method by which an insurer can be indemnified—MCL 500.3104(2). If the Legislature had intended indemnification because of fault, it would have included such a provision in MCL 500.3104(2) or MCL 500.3116. Because the Legislature did not do so within the provisions where it allowed indemnification and recoupment from a tortfeasor, the Legislature has spoken.

As GFL has noted below, the doctrine of *expressio unius est exclusio alterius* applies. Nearly 100 years ago, this Court recognized that, as it relates to the doctrine, "'No maxim of the law is of more general or uniform application, and it is never more applicable than in the construction and interpretation of statutes.'" *Taylor v Mich Pub Utilities Com*, 217 Mich 400, 403; 186 NW 485 (1922), quoting Broom's Legal Maxims, 663. As the *Taylor* Court recognized, "When what is expressed in a statute is creative, and not in a proceeding according to the course of the common law, it is exclusive, and the power exists only to the extent plainly granted." *Taylor, supra.*

Here, the Michigan Legislature created "first-party benefits," a sub-category of economic damages. The Michigan Legislature created the obligation that insurers pay first-party benefits without regard to fault. The Michigan Legislature created circumstances where an insurer may obtain indemnification, MCL 500.3104(2), without specifying indemnification from any non-insurer or tortfeasor. The Michigan Legislature created circumstances where an insurer may recoup first-party benefits from a purportedly at-fault tortfeasor, MCL 500.3116. MCL 500.3116 does not reference contractual indemnification as a method for which an insurer (and, therefore a self-insurer) can obtain reimbursement for its first-party benefits paid. The Legislature certainly could have acknowledged contractual indemnification, as it referenced "indemnification" in MCL

500.3104(2). The fact that the Legislature did not provide for contractual indemnification confirms that it did not intend for contractual indemnification under the doctrine of *expressio unius est exclusio alterius*.

If that were not enough, allowing contractual indemnification from tortfeasors would cause numerous problems and be contrary to public policy. Allowing contractual indemnification from purported tortfeasors would certainly defeat one of the primary purposes of the No Fault Act—reducing litigation. *Kern v Blethen-Coluni*, 240 Mich App 333, 339; 612 NW2d 838 (2000). This ongoing lawsuit demonstrates how even the ability to argue for contractual indemnification leads to increased litigation.

Finally, the City contends that imposing an indemnification obligation would result in minimal harm to the No Fault Act system. However, the No Fault Act was created by the Legislature to balance all of these competing interests and result in one comprehensive statutory scheme reflecting the public policy of the state of Michigan. The City essentially second-guesses the Legislature's wisdom. More accurately, the City seeks to change the statutory scheme for its own self-interest, ignoring the wisdom of the Legislature and the public policy decisions within the No Fault Act.

Indeed, if this Court were to issue an opinion allowing a self-insurer to obtain indemnification, this will result in the No Fault system providing a new "reward" for self-insuring. Although an insurer does not have the ability to fortuitously contract with potential future tortfeasors, a self-insurer does. Here, the purported obligation to indemnify arises out of a general indemnification obligation found in an ordinary vendor contract. These provisions routinely apply in tort circumstances, shifting one party's tort liability onto the other party. Many entities have contracts with other entities allowing for general indemnification.

Unfortunately, it is most often that the entity with the greater bargaining power is the one that mandates inclusion of an indemnification provision in its favor. And, most often, it is only larger entities that can afford to self-insure. This Court can see for itself that allowing contractual indemnification from a tortfeasor will allow the largest and most powerful entities in Michigan to (a) self-insure to avoid paying premiums to insurers; and (b) unlike insurers, be in a position to contractually obtain indemnification from entities with less bargaining power to avoid paying its first-party benefits obligation. The goal of the No Fault Act was to spread the risk of first-party benefits among highly-regulated insurers without regard to fault, not spread the risk among the entities with the least bargaining power. The cases at issue have discussed freedom to enact ordinances at the municipal level, rather than contractual principles. Moreover, by self-insuring, the City's identity for this lawsuit was not as a municipality, but as an insurer under the No Fault Act. By self-insuring, the City agreed to be bound to the rights and obligations of an insurer. The City is more than content to deem itself an insurer to avoid paying premiums, it must also be content to limit itself to the remedies available to insurers—none of whom are allowed to contractually shift away their obligation to "bear the liability" for first party benefits owed. No other insurer can do what the City has tried to do—take the benefit of not paying insurance and couple it with recouping those first-party benefits against a purported tortfeasor. The City, as a self-insurer, cannot do so either.

And, even if these entities with the least bargaining power have insurance—assuming it is even sufficient insurance—there will be issues regarding insurance coverage—leading to more litigation. Moreover, general liability coverage may be triggered, reducing the certainty of having the automobile insurance industry regulating costs and premiums. At its core, the No Fault Act is simple: (a) insurers pay first-party benefits without regard to fault and with only limited measures

for reimbursement, MCL 500.3105; and (b) at-fault tortfeasors remain liable for non-economic damages if the statutory threshold is met, MCL 500.3135. The City's attempt to blend these two systems is inconsistent with the letter and spirit of the No Fault Act.

The City's protestation that it is merely protecting its taxpayers against runaway liability is absurd. If the City wants to protect the taxpayers, it can do what nearly every other individual and entity in Michigan does—secure appropriate insurance. There is no requirement that the City self-insure. Instead, the City wants the rights of an insurer (limited liability for first-party benefits) without the obligations (minimal ability to shift responsibility). The City claims that it is at risk because it is not able to rely on the MCCA indemnification provisions; however, by not being an insurer, the City does not have to pay the $220.00 per vehicle MCCA assessment per year that insurers now have to pay. http://www.michigancatastrophic.com/. This is yet another financial benefit for the City not available to insurers.

Without ever having guiding precedent to support its use of vague contractual indemnification language to foist its statutory liability for first party benefits onto its vendors, and several decisions indicating that priority may not be shifted, the City chose to self-insure. Like any other insurer, it bears the liability for first party benefits incurred. If it is less expensive than insurance, a self-insuring entity saves money. If it is more expensive than insurance, a self-insuring entity is well-served to procure insurance. While an entity is self-insuring, the reasonable conclusion is that they are saving money compared to the insurance cost. The City is bound by its decision to obtain the benefits of self-insuring in that it also incurs all of the obligations of self-insuring.

In sum, whether preserved and properly presented, all of the City's arguments are without merit. This Court can and should deny the City's application for leave to appeal.

e. Additional Reasons Why This Court Need Not Grant Leave to Appeal

In addition to the lack of merit in the City's arguments, there is no compelling reason for this Court to grant the City's application for leaving to appeal.

Although GFL requested publication, the Court of Appeals denied same, confirming that the decision is not and will not be binding on any future court. It is unclear why this Court would have to invest its limited judicial resources to review an unpublished decision.

In fact, the denial of publication may have fairly been premised on the relative unlikelihood that this issue will ever arise again. Insurers, who have been participating and honoring their statutory obligations for decades, are fully aware that there is no statutory basis for them to seek indemnification. Indeed, this appears to be the first time a self-insurer has sought to distance itself from a true insurer by pursuing contractual indemnification. And no self-insurer has found itself able, or more likely willing, to desperately try to force its vendors to pay for a first-party benefit obligation that it voluntarily incurred. Indeed, inasmuch as first-party liability is statutory in nature, rather than fault-based, there is no applicability to fault-based indemnification provisions. Accordingly, there is not a significant likelihood of this particular decision truly raising itself in the future.

At the same time, to the extent that the City is truly aggrieved by the ruling and fearful of runaway liability in future circumstances, the City has other options. First, the City can and should obtain insurance. The City is currently spared from paying premiums. By not paying premiums, the City is also not indirectly contributing the $220.00 per policy to the MCCA indemnification pool. The City is likely saving substantial money by self-insuring and not allowing its numerous vehicles to be included within the risk pool. While the City is statutorily authorized to self-insure, there is no reason to confer special benefits on those who choose to self-insure.

Moreover, the real concern for the City may be a future runaway verdict, but this is why most entities insure against such a risk. While the City apparently is not pleased with its insurance options, this is not a basis for rewriting a statute. Those who choose not to self-insure are fully protected against a runaway verdict. This is a, if not the, major incentive to incur the expense of insuring. Under the No Fault Act, the insurers bear the responsibility for first-party benefits—and the City has voluntarily chosen that risk. Where, as here, the first-party obligations are far from "runaway," there is no need to bend or rewrite the law to protect the City against its voluntary decision to self-insure.

Alternatively, the City should present its circumstances to the Legislature and pursue amendment of the No Fault Act to allow for contractual indemnification. It is the Legislature, rather than this Court, that should be considering whether to allow an exception for the City and other self-insurers. The Legislature is in the best position to weigh the pros and cons of allowing such a modification. There is no need for this Court to rewrite the statutory scheme to graft in indemnification methods that the Legislature did not include. Inasmuch as the current matter does not involve a runaway liability, there is time for the City to take the proper course of action. This Court should exercise judicial restraint and decline to intervene to review an unpublished decision of the Michigan Court of Appeals declining to rewrite a comprehensive statutory scheme.

f. Conclusion

The No Fault Act is a comprehensive statutory scheme that provides for only limited circumstances where an insurer paying mandatory, first-party benefits may obtain reimbursement for those benefits. Those limited circumstances do not include contractual indemnification. As a self-insurer, the City can gain no more than any other insurer under the No Fault Act. The City is prohibited from obtaining indemnification from GFL for its decision to operate a municipal bus

system, but then self-insure those vehicles. The Michigan Court of Appeals properly reversed the trial court's ruling granting the City's motion for summary disposition and denying GFL's motion for summary disposition. This Court can and should deny the City's application for leave to appeal.

CONCLUSION AND REQUEST FOR RELIEF

For all these reasons, GFL respectfully requests that this Honorable Court deny the City of Detroit's application for leave to appeal.

Respectfully submitted,

CARDELLI LANFEAR, P.C.

By: /s/ Anthony F Caffrey III
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Dated: October 22, 2019

ATTACHMENT 1

STATE OF MICHIGAN

COURT OF APPEALS

KEITH BRONNER,

Plaintiff,

and

ANGELS WITH WINGS TRANSPORT, LLC,

Intervening Plaintiff,

v

CITY OF DETROIT,

Defendant/Third-Party Plaintiff-Appellee,

and

GFL ENVIRONMENTAL USA, INC., formerly known as RIZZO ENVIRONMENTAL SERVICES,

Third-Party Defendant-Appellant.

UNPUBLISHED
July 9, 2019

No. 340930
Wayne Circuit Court
LC No. 15-013452-NF

Before: MURRAY, C.J., and RIORDAN and CAMERON, JJ.

PER CURIAM.

This matter arises from an automobile accident that resulted in injuries to plaintiff, Keith Bronner, for which defendant/third-party plaintiff the City of Detroit ("the City")—as a self-insured entity under the no-fault insurance act, MCL 500.3101 *et seq*.—paid personal protection insurance (PIP) benefits. The City then filed a third-party complaint against third-party defendant, GFL Environmental USA, Inc., formerly known as Rizzo Environmental Services.

The City claimed that (1) GFL contractually assumed a position of priority regarding payment of no-fault benefits or that, alternatively, (2) GFL had a contractual obligation to indemnify the City for any losses, including PIP benefits, caused by GFL's negligence. The City and GFL filed cross-motions for summary disposition. The trial court denied GFL's motion for summary disposition and granted summary disposition to the City, concluding that the City was contractually entitled to indemnification from GFL. Also, relying on the contract between GFL and the City, the trial court awarded the City attorney fees and costs. After the remaining claims were settled, GFL appealed as of right those decisions by the trial court. We now reverse both orders and remand for entry of an order granting GFL's motion for summary disposition.

I. BACKGROUND FACTS & PROCEDURAL HISTORY

GFL provides garbage collection services in the City pursuant to a services contract the parties signed in February 2014. Relevant to the present dispute, the services contract contains an indemnification clause, a provision requiring GFL to defend the City against certain legal actions, and a provision requiring GFL to maintain no-fault insurance.

In September of 2014, Bronner sustained bodily injury in a motor vehicle accident when a GLF garbage truck, driven by GFL employee Jason Herndon, struck a City-owned bus in which Bronner was riding. For purposes of this appeal, however, whether Herndon negligently caused the accident is not in dispute. Following the accident, Bronner sought payment of PIP benefits from the City, which is a self-insured entity under the no-fault act. When the City refused to pay the no-fault benefits, Bronner initiated a lawsuit. The City settled its dispute with Bronner and paid him the PIP benefits.

The City, relying on the terms of its services contract with GFL, then filed a third-party complaint against GFL, alleging three things: (1) indemnification from GFL because the City's obligation to pay no-fault benefits arose out of the negligence of GFL's driver who caused the accident by his negligent conduct; (2) contribution from GFL because GFL breached a duty to operate its vehicle in a safe and reasonable manner; and (3) breach of contract by failing to indemnify and defend the city. GFL moved the trial court to summarily dispose of the City's third-party complaint pursuant to MCR 2.116(C)(8), arguing that the City was improperly attempting to avoid liability under the no-fault act. GFL contends that the no-fault statutory scheme does not allow for the City to do so, and that permitting the City to recover pursuant to the services contract would violate the public policy upon which the no-fault act was based. The City responded with its own motion for summary disposition, asserting that the services contract made GFL the priority insurer under the no-fault act, or alternatively, that GFL was required to indemnify the City for payment of Bronner's PIP benefits because such liability was incurred due to the negligence of GFL's employee under the terms of the contract.

After two hearings on the issue, the trial court denied GFL's, and granted the City's, motions for summary disposition, reasoning that the City was entitled to indemnification by GFL under the contractual terms. The trial court declined to determine whether the contract resulted, or legally could have resulted, in GFL becoming the highest-priority insurer under the no-fault act. Later, the trial court granted the City's request for attorney fees and costs pursuant to a clause in the contract, and rejected GFL's argument that the City was not entitled to attorney fees

and costs it paid to its salaried, in-house attorneys, who would have been paid regardless of GFL's alleged negligence, the automobile accident, and this resulting lawsuit.

II. PAYMENT OF NO-FAULT BENEFITS

GFL argues that the trial court erred when it granted the City's motion for summary disposition because the City, as the owner and insurer of the bus on which Bronner was injured, is obligated to pay Bronner's first-party PIP benefits, and the City's attempts to contract away that obligation violate the no-fault act. We conclude that although the City did not transfer its obligation to pay no-fault benefits, the no-fault act does not permit the City to seek indemnification from GFL.

A. STANDARD OF REVIEW & GENERAL LAW

This Court reviews "de novo a circuit court's summary disposition decision." *Packowski v United Food & Commercial Workers Local 951*, 289 Mich App 132, 138; 796 NW2d 94 (2010). A written contract's interpretation is also reviewed de novo. *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005). Similarly, questions involving statutory interpretation are also reviewed de novo. *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 529; 740 NW2d 503 (2007).

"The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature." *Ford Motor v Dep't of Treasury*, 288 Mich App 491, 496; 794 NW2d 357 (2010). Determining legislative intent begins with the words used in the statute. *MacKenzie v Wales Twp*, 247 Mich App 124, 127; 635 NW2d 335 (2001). "Unless defined in the statute, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used." *Id.* "If the statutory provision at issue is clear and unambiguous, it must be enforced as written, and no judicial construction is permitted or required." *Lockport Twp v Three Rivers*, 319 Mich App 516, 520; 902 NW2d 430 (2017).

"Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court." *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 547; 904 NW2d 192 (2017) (quotation marks omitted). "We enforce contracts according to their terms, as a corollary to the parties' liberty to enter into a contract." *Reicher v SET Enterprises, Inc*, 283 Mich App 657, 664; 770 NW2d 902 (2009). "Accordingly, we examine the language in the contract, giving it its ordinary and plain meaning if such would be apparent to a reader of the instrument." *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003). "An unambiguous contractual provision reflects the parties' intent as a matter of law, and [i]f the language of the contract is unambiguous, we construe and enforce the contract as written." *Holland v Trinity Health Care Corp*, 287 Mich App 524, 527; 791 NW2d 724 (2010) (quotation marks omitted).

" 'The general rule [of contracts] is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts.' " *Terrien v Zwit*, 467 Mich 56, 71; 648 NW2d 602 (2002), quoting *Twin City Pipe Line Co v Harding Glass Co*, 283 US 353, 356; 51 S Ct 476; 75 L Ed 1112 (1931)

(alteration in *Terrien*). Thus, pursuant to the general rule, "[p]arties are free to contract as they see fit, and courts must enforce contracts as written unless they are in violation of law or public policy." *Village of Edmore v Crystal Automation Sys, Inc*, 322 Mich App 244, 263; 911 NW2d 241 (2017). "Absent some specific basis for finding them unlawful, courts cannot disregard private contracts and covenants in order to advance a particular social good." *Terrien*, 467 Mich at 70.

B. APPLICABLE LAW & ANALYSIS

The trial court erred by denying GFL's motion for summary disposition and granting summary disposition to the City because the City cannot seek contract indemnification for the payment of PIP benefits under the no-fault act.

"In Michigan, before the enactment of the no-fault insurance act, the only available recourse to victims of motor vehicle accidents seeking to recover damages was to file a common-law tort action." *McCormick v Carrier*, 487 Mich 180, 233-334; 795 NW2d 517 (2010). "[U]nder [this] tort liability system[,] the doctrine of contributory negligence denied benefits to a high percentage of motor vehicle accident victims, minor injuries were overcompensated, serious injuries were undercompensated, long payment delays were commonplace, the court system was overburdened, and those with low income and little education suffered discrimination." *Id*. at 234 (quotation marks and citation omitted). In response to these concerns, "with the enactment of the no-fault act, the Legislature abolished tort liability generally in motor vehicle accident cases and replaced it with a regime that established that a person injured in such an accident is entitled to certain economic compensation from his own insurance company regardless of fault." *Id*. (quotation marks and citation omitted). "A primary goal of the no-fault act is to provide an efficient, affordable system of automobile insurance," *Stevenson v Reese*, 239 Mich App 513, 519; 609 NW2d 195 (2000), resulting "in expeditious compensation of damages" while minimizing "administrative delays and factual disputes," *Brown v Home-Owners Ins Co*, 298 Mich App 678, 685; 828 NW2d 400 (2012).

No-fault insurance is compulsory for Michigan motorists. *McCormick*, 487 Mich at 234. That is, "the no-fault act requires car owners to be primarily responsible for insurance coverage on their vehicles." *Fuller v GEICO Indemnity Co*, 309 Mich App 495, 503; 872 NW2d 504 (2015) (quotation marks and citation omitted). Specifically, "MCL 500.3101(1) mandates a vehicle's owner or registrant to maintain three types of coverage under his or her no-fault policy: security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance." *Fuller*, 309 Mich App at 503 (quotation marks and citation omitted). With regard to insurers, the no-fault act "specifies the order in which various potentially liable insurers will be required to cover a claim for benefits." *Parks v Detroit Auto Inter-Ins Exch*, 426 Mich 191, 201; 393 NW2d 833 (1986). As a general matter, a passenger on a municipal bus, who is not covered by any other policy, is entitled to PIP benefits from the insurer of the bus. See MCL 500.3114(2).

Under the no-fault act, entities, like the City in this case, can be both the owner of a vehicle and a "self-insurer." See *Enterprise Leasing Co of Detroit v Sako*, 233 Mich App 281, 284; 590 NW2d 617 (1998). To obtain self-insured status, an entity must represent that it is able and willing to satisfy judgments against it. *Id*. A certificate of self-insurance serves as "the

functional equivalent of a commercial policy of insurance with respect to the no-fault act." *Id.* In other words, pursuant to MCL 500.3101(4), "[t]he no-fault act explicitly treats a self-insurer as an insurer, with 'all the obligations and rights of an insurer.' " *Allstate Ins Co v Elassal*, 203 Mich App 548, 554; 512 NW2d 856 (1994).

Turning to the present case, for purposes of the no-fault act there is no dispute that the City is a self-insurer, required to pay PIP benefits to Bronner for the injuries he sustained in the accident. The City paid Bronner's no-fault benefits. The dispute concerns GFL's liability.

1. CONTRACTUAL SHIFTING OF NO-FAULT PRIORITY

Before turning to the dispositive issue, we first recognize that the services contract cannot be interpreted as an attempt to shift GFL into the position of the primary no-fault insurer in this case, as such a contractual shift in priority is void because the City, as the owner of the bus, cannot abdicate its responsibility to pay primary PIP benefits in accordance with the no-fault act. See *Fuller*, 309 Mich App at 502-504. This prohibition on the shift of liability typically has been applied in the context of rental car agencies attempting to pass on responsibility for no-fault insurance to renters or the renters' insurance agencies. Recognizing that an owner of a vehicle has a statutory obligation to maintain primary no-fault insurance coverage for use of its vehicles, see MCL 500.3101, the Michigan Supreme Court has concluded that an owner—including an owner who is self-insured—cannot contractually shift this statutory responsibility for maintaining primary no-fault benefits to another party. See *State Farm Mut Auto Ins Co v Enterprise Leasing Co*, 452 Mich 25, 33-36; 549 NW2d 345 (1996). See also *Corwin v DaimlerChrysler Ins Co*, 296 Mich App 242, 261-263; 819 NW2d 68 (2012); *Auto-Owners Ins Co v Martin*, 284 Mich App 427, 449; 773 NW2d 29 (2009). However, the City paid no-fault benefits to Bronner. Therefore, no impermissible shift in priority occurred through the contract.

2. CONTRACTUAL INDEMNIFICATION

The City asserts that GFL's contractual agreement to indemnify the City for losses caused by GFL's negligence requires GFL's reimbursement to the City for PIP benefits paid to Bronner. We conclude that the indemnification clause of the agreement is unenforceable under the no-fault act.

As noted, *supra*, "[p]arties are free to contract as they see fit, and courts must enforce contracts as written unless they are in violation of law or public policy." *Village of Edmore*, 322 Mich App at 263, citing *Wilkie*, 469 Mich at 51. Where the term of a contract "is in conflict with . . . the no-fault act, the language of the statute must prevail . . . ." *State Farm Mut Auto Ins Co v Ruuska*, 412 Mich 321, 336; 314 NW2d 184 (1982).

Unlike mandatory PIP coverages, parties to a contract are free to shift the costs associated with optional no-fault coverages. In *Universal Underwriters Ins Co v Kneeland*, 464 Mich 491; 628 NW2d 491 (2001), our Supreme Court considered a "courtesy car agreement" between a car dealership and an individual borrowing a vehicle while work was done on her personal vehicle. *Id.* at 492-493. The agreement contained a clause in which the individual borrowing the car "agree[d] to assume all responsibility for damages" while the vehicle was in her possession. *Id.* On appeal, the Michigan Supreme Court considered the meaning of this provision and whether it

violated the no-fault act by shifting responsibility for all no-fault liability. The Court determined that the clause was ambiguous with regard to the shift in responsibility because it could be read to shift "any" damages or, in the alternative, it could be more narrowly read to apply only to collision damages which arise while a car is in the borrower's possession as compared to medical and other costs which would arise after an accident and are mandated by statute. *Id*. at 496-498.

Presuming that the parties intended to enter into a valid and enforceable agreement, the Court concluded that the parties *only* intended to shift liability for collision damages, an *optional* form of coverage under the no-fault act. *Id*. at 496-499. Emphasizing that collision coverage was an optional form of coverage, the Court concluded that allocating responsibility for collision coverage was purely a matter of contract that did not violate the no-fault act. *Id*. 500. Indeed, the holding in *Universal Underwriters* specifically recognized that a contractual allocation of responsibility for collision damages is not void under the no-fault act because "[t]he statutory language does *not* reflect an intent to abolish *contractual* liability for collision damages, an *optional* form of insurance *not required by the no-fault act.*" *Id*.

The Court acknowledged the limitations of its holding in a footnote, emphasizing that its holding was "limited to contract claims for *collision* damages" and offering "no view regarding the legality of a contract purporting to shift liability for other categories of damages." *Id*. Elsewhere, citing *State Farm Mut Auto Ins Co*, 452 Mich at 36, the *Universal Underwriters* Court suggested that a "shift of liability" that "could reach damages for which no-fault insurance coverage is mandatory . . . might contravene the no-fault act." *Universal Underwriters Ins Co*, 464 Mich at 496-497. But, the Court did not decide whether a contractual shift reaching beyond optional collision coverage was illegal; instead, the Court simply noted that the "argument is available" for future cases. *Id*. at 496 n 3.

As noted, left unanswered by the *Universal Underwriters* decision is whether parties may contractually seek reimbursement for damages subject to mandatory coverage under the no-fault act. See *id*. We conclude that the text of the no-fault statute provides the only way for shifting the costs of mandatory PIP coverage after payment is made, and because the private indemnification agreement used in this case is not anticipated by the act, it is unenforceable.

When it interprets a statute, a reviewing court seeks to ascertain and implement the intent of the Legislature. *Huron Mountain Club v Marquette Co Rd Comm*, 303 Mich App 312, 323; 845 NW2d 523 (2013). The Legislature's intent is best expressed through the plain meaning of the statute's language. *Ter Beek v City of Wyoming*, 495 Mich 1, 8; 846 NW2d 531 (2014).

Although there is no provision expressly prohibiting an insurer from contracting away the cost of its obligation to provide mandatory PIP benefits, this Court has recognized the comprehensive nature of the no-fault act. *Citizens Ins Co of Am v Buck*, 216 Mich App 217, 223; 548 NW2d 680, 684 (1996) ("The no-fault act provides a comprehensive scheme for payment, as well as recovery, of certain "no-fault" benefits, including personal protection insurance benefits."). This comprehensive scheme provides limited avenues for insurers, like the City, to recover the costs incurred from paying PIP benefits.

The Michigan Catastrophic Claims Association (MCCA), is one avenue available. The MCCA is a statutorily created organization of all insurers who provide no-fault insurance in

Michigan. MCL 500.3104. The MCCA is required to reimburse member companies for the amount of PIP losses they incur in excess of a certain dollar amount per claim (*i.e.*, "catastrophic claims"). To fund its statutory indemnification obligations, the MCCA assesses premiums on member companies in relation to the number of no-fault policies each member writes in Michigan.[1] Insurers then pass these assessments along to their Michigan policyholders.[2] For uninsured Michigan automobile accident victims, the Michigan Assigned Claims Plan (MACP) assigns claims to insurers for payment of no-fault benefits, and insurers pass on these costs to policyholders through increased premiums. MCL 500.3171-3172; MCL 500.3385. Finally, MCL 500.3116 permits insurers to recover the cost of PIP benefits by exerting a lien on tort recovery in certain limited circumstances. These statutory provisions represent the only way permitted by the no-fault act for shifting costs after PIP benefits have been paid to the injured party. By negative implication of these provisions, other reimbursement mechanisms are prohibited.[3]

Because "[i]t is well settled that when a statute provides a remedy, a court should enforce the legislative remedy rather than one the court prefers." *City of S Haven v Van Buren Co Bd of Com'rs*, 478 Mich 518, 528–29; 734 NW2d 533 (2007) (citation omitted). Where a statute gives rights and prescribes remedies, such remedies must be strictly pursued. *Id.* Because the no-fault act does not provide any other vehicle for passing on or recouping costs associated with

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[1] See MCL 500.3104(7)(d), which provides in pertinent part:

> Each member shall be charged an amount equal to that member's total written car years of insurance providing the security required by [MCL 500.3101(1)] or [MCL 500.3103(1)], or both, written in this state during the period to which the premium applies, multiplied by the average premium per car. The average premium per car shall be the total premium calculated divided by the total written car years of insurance providing the security required by section 3101(1) or 3103(1) written in this state of all members during the period to which the premium applies.

[2] See *United States Fidelity Ins. & Guaranty Co v Michigan Catastrophic Claims Ass'n*, 483 Mich 918, 432 n 32; 762 NW2d 911 (2009); *In re Certified Question (Preferred Risk Mut Ins Co v Michigan Catastrophic Claims Ass'n)*, 433 Mich 710, 729, 449 NW2d 660 (1989) (explaining that the MCCA premiums are "inevitably" "passed on" to Michigan's no-fault insurance customers); MCL 500.3104(22), which provides that "[p]remiums charged members by the association shall be recognized in the rate-making procedures for insurance rates in the same manner that expenses and premium taxes are recognized."

[3] See Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), 107-111. Additionally relevant is the whole-text canon, which encourages us to look at the entire statutory scheme. See *id.* at 167 ("Perhaps no interpretative fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts.").

providing PIP benefits, beyond those associated with the MCCA, the MACP, or exerting a lien on tort recovery, the City is foreclosed from shifting this cost to GFL. If the legislature had desired other cost-shifting procedures, or wants to in the future, it is the legislature's province to create the appropriate statutory mechanism to do so. It is beyond the role of this Court to create such a mechanism by judicial fiat.

In sum, the indemnification agreement between the City and GFL as it relates to the recoupment of mandatory PIP payments is unenforceable under the no-fault act. Thus, we reverse the trial court's order granting summary disposition in favor of the City and remand with direction to the trial court to enter an order granting GFL's motion for summary disposition.

III. ATTORNEY FEES

GFL also argues that the trial court erred when it awarded attorney fees to the City pursuant to the terms of the services contract.[4] We agree.

A. STANDARD OF REVIEW &APPLICABLE LAW

Generally, a trial court's decision to award attorney fees, and the reasonableness of the fees, is reviewed by this Court for an abuse of discretion. *Patrick v Shaw*, 275 Mich App 201, 204; 739 NW2d 365, 369 (2007), aff'd 480 Mich 1050 (2008). However, the award of attorney fees in this case is a matter of contract. The interpretation of a contract is a question of law that this Court reviews de novo. *In re Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008). "An error of law necessarily constitutes an abuse of discretion." *Denton v Dep't Of Treasury*, 317 Mich App 303, 314; 894 NW2d 694 (2016).

"Michigan courts follow the American Rule with respect to the payment of attorney fees and costs." *Pransky v Falcon Group, Inc*, 311 Mich App 164, 193; 874 NW2d 367 (2015), lv den 499 Mich 908 (2016). Under this rule, each party is responsible for his or her own attorney fees unless an express legal exception applies. *Id*. at 194; *Fleet Bus Credit v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584, 589; 735 NW2d 644 (2007). A recognized exception to the American Rule exists when the parties have a contract regarding payment of attorney fees.

[4] Importantly, the City has not requested attorney fees as a result of it being the prevailing party or having been successful in its litigation in this case. Rather, the City sued for attorney fees for being required to litigate Bronner's request for payment of damages for injuries caused by the negligence of GLF's employee, Herndon. As we have stated, for the purposes of this appeal, the parties are not disputing whether Herndon negligently caused the automobile accident. Therefore, while we have held that the services contract could not shift responsibility from the City to GFL for the payment of PIP benefits, the no-fault act does not bar a contractual agreement by GFL to pay for the attorney fees for litigation arising out of its negligence. "Nothing in the no-fault system relieves a motor vehicle operator of liability which he may have incurred in contract." *Nat'l Ben Franklin Ins Co v Bakhaus Contractors, Inc*, 124 Mich App 510, 513; 335 NW2d 70 (1983). See also *Universal Underwriters Ins Co*, 464 Mich at 500.

Fleet Bus Credit, 274 Mich App at 589. Contracts for payment of attorney fees are valid and enforceable unless contrary to public policy. *Pransky*, 311 Mich App at 194.

B. ANALYSIS

The City sought attorney fees under Article 9 of the services contract, which states, in pertinent part, that GFL "agrees to indemnify, defend, and hold the City harmless against and from . . . fees and expenses for attorneys . . . to the extent caused by . . . [a]ny negligent or tortious act, error or omission attributable in whole or in part to [GFL] or any of its Associates . . . ." The relevant language requires GFL to pay the City's fees and expenses for attorneys "to the extent caused by" GFL's negligence. Although GFL's negligence led to the current lawsuit, the current lawsuit did *not* cause the City to incur expenses for payment of in-house attorney fees and costs. Indeed, the City does not dispute that these individuals would have been paid regardless of the current lawsuit. Accordingly, it cannot be said that GFL caused the City to incur these salaries, to have these salaries imposed upon the City, or to have the salaries asserted against the City. As such, the City is not entitled to seek payment of the City's in-house attorneys under this term of the contract. See, e.g., *Escanaba & Lake Superior R Co v Keweenaw Land Ass'n, Ltd*, 156 Mich App 804, 817-818; 402 NW2d 505 (1986) (holding that attorney fees for in-house counsel accrued in the regular course of business were not payable under similar circumstances). We therefore also reverse that order by the trial court.

IV. CONCLUSION

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Michael J. Riordan
/s/ Thomas C. Cameron

ATTACHMENT 2

Court of Appeals, State of Michigan

ORDER

Keith Bronner v City of Detroit

Docket No. 340930

LC No. 15-013452-NF

Christopher M. Murray
Presiding Judge

Michael J. Riordan

Thomas C. Cameron
Judges

The Court orders that the motion for reconsideration is DENIED.

Presiding Judge

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

deadline file Appeal 8/30/19 jcg
deadline tax costs - 9/6/19

AUG 0 9 2019

Date

Chief Clerk

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